

APPENDIX A:
Redlined version showing proposed amendments to
Rules 16, 26, 26.1, 33, 34, 37 and 45, Arizona Rules of Civil Procedure

Rule 16(b). Scheduling and Subjects to Be Discussed at Comprehensive Pretrial Conference in Non-Medical Malpractice Cases

Except in medical malpractice cases, upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference. At any comprehensive pretrial conference under this rule, except for conferences conducted in medical malpractice cases, the court may:

- (1) Determine the additional discovery to be undertaken and a schedule therefore. The schedule shall include depositions to be taken and the time for taking same; production of documents or electronically stored information, including the form or forms in which the electronically stored information should be produced; non-uniform interrogatories; admissions; inspections or physical or mental examinations; and any other discovery pursuant to these rules. The Court may also adopt any agreements the parties reach for asserting claims of privilege or of protection as to trial-preparation material after production.
- (2) Determine a schedule for the disclosure of expert witnesses. Such disclosure shall be within 90 days after the conference except upon good cause shown.
- (3) Determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4).
- (4) Determine a date for the disclosure of non-expert witnesses and the order of their disclosure; provided, however, that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the completion of discovery. Any witnesses not so disclosed shall not be allowed to testify at trial unless there is a showing of good cause.
- (5) Resolve any discovery disputes which have been presented to the court by way of motion not less than 10 days before the conference. The moving party shall set forth the requested discovery to which objection is made and the basis for the objection. The responding party may file a response not less than 3 days before the conference. No replies shall be filed unless ordered by the court. The court shall assess an appropriate sanction, including those permitted under Rule 16(f), against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist discovery.
- (6) Eliminate non-meritorious claims or defenses.
- (7) Permit the amendment of the pleadings.
- (8) Assist in identifying those issues of fact which are still at issue.

- (9) Obtain stipulations as to the foundation or admissibility of evidence.
- (10) Determine the desirability of special procedures for management of the case.
- (11) Consider alternative dispute resolution.
- (12) Determine whether any time limits or procedures set forth in the discovery rules or set forth in these Rules or Local Rules of Practice should be modified or suspended.
- (13) Determine whether Rule 26.1 has been appropriately complied with by the parties.
- (14) Determine a date for a settlement conference if such a conference is requested by a party or deemed advisable by the court.
- (15) Determine a date for filing the joint pretrial statement required by subpart (d) of these Rules.
- (16) Determine a trial date.
- (17) Discuss the imposition of time limits on trial proceedings or portions thereof, the use of juror notebooks, the giving of brief pre-voir dire opening statements and preliminary jury instructions, and the effective management of documents and exhibits.
- (18) Make such other orders as the court deems appropriate.

Rule 26(b)(1). Discovery Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause considering the limitations in the final paragraph of subsection (b)(1) of this Rule. The court may specify conditions for the discovery.

The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Rule 26.1. Prompt Disclosure of Information

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

- (1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.
- (2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.
- (3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.
- (4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.
- (5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.
- (6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.
- (7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.
- (8) The existence, location, custodian, and general description of any tangible evidence, ~~or~~ relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.
- (9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, and copying, testing or sampling. Unless good cause is stated for not

doing so, a copy of ~~each~~ the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Rule 26.1(f). Claims of Privilege or Protection of Trial Preparation Materials.

(A) Information Withheld. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Rule 33(c). Option to produce business records

Where the answer to an interrogatory may be derived or ascertained from the business records, **including electronically stored information**, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be derived or ascertained.

Rule 34. Production of documents, electronically stored information, and things and entry upon land for inspection and other purposes.

- (a) **Scope.** Any party may serve on any other party requests (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test or sample any designated documents or electronically stored information — (including writings, drawings, graphs, charts, photographs, sound recordings, images ~~phone records~~, and other data or data compilations stored in any medium from which information can be obtained, — translated ~~through detection devices~~ into reasonable usable form when translation is practicably necessary), or to inspect, ~~and~~ copy, test, or sample any **designated** tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).
- (b) **Procedure and Limitations.** The requests may, without leave of the court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The requests shall set forth the items to be inspected either by individual item or by specific category, and describe each item and specific category with reasonable particularity. The request may specify the form or forms in which electronically stored information is to be produced. The requests(s) shall not, without leave of court, cumulatively include more than ten (10) distinct items or specific categories of items. Each request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. If a party believes that good cause exists for more than ten (10) distinct items or categories of items, that party shall consult with the party upon whom a request would be served and attempt to secure a written stipulation to that effect. The party upon whom a request is served shall serve a written response within 40 days after the service of the request, except that a defendant may serve a response within 60 days after service of the summons and complaint upon that defendant, or execution of a waiver of service by that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event stating the reasons for the objection ~~shall be stated~~. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting a request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the

request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) A party who produced documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (iii) a party need not produce the same electronically stored information in more than one form.

Rule 37(g). Electronically stored information.

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the Arizona court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, **and copying, testing, or sampling of** designated books, documents, **electronically stored information,** or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the recipients' rights and obligations under the subpoena as follows:

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A command to produce evidence or to permit inspection, **copying, testing, or sampling,** may be joined with a command to appear at trial or hearing or at deposition or may be issued separately. **A subpoena may specify the form or forms in which electronically stored information is to be produced.**

(2) A subpoena commanding attendance at a trial or hearing shall issue from the superior court for the county in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the superior court for the county in which the case is pending. If separate from a subpoena commanding the attendance of a person, a subpoena for production, ~~or~~ inspection, **copying, testing, or sampling** shall issue from the superior court for the county in which the production or inspection is to be made.

(b) Service

(1) A subpoena may be served by any person who is not a party and is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law.

(2) When the subpoena commands the appearance of a party at a trial or hearing, or is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered.

(3) Copies of all subpoenas shall be served on each party.

(4) A subpoena may be served anywhere within the state.

(5) Proof of service when necessary shall be made by filing with the clerk of the court of the county in which the case is pending a statement of the date and manner of service and of the names of the person served, certified by the person who made service.

(c) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The superior court of the county where the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of the duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorneys' fee.

(2)(A) A person commanded to produce and permit inspection **and, copying, testing, or sampling** of designated books, papers, documents, **electronically stored information** or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection **and, copying, testing, or sampling** may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to **producing inspection or copying of** any or all of the designated materials or **inspection** of the premises—**or to producing electronically stored information in the form or forms requested**. If objection is made, the party serving the subpoena shall not be entitled to inspect **and, copy, test, or sample** the materials except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, **inspection, copying, testing, or sampling**. Such an order to compel **production** shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection **and, copying, testing, or sampling commanded**.

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(d) Duties in Responding to Subpoena

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must

produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

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